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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

UNITED STATES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a seniority system that has been found to be free of any discriminatory purpose is protected by Section 703(h) of Title VII.

2. Whether a test for determining the bona fides of a seniority system which focuses exclusively on discriminatory effect is consistent with this Court's decision in *Teamsters* v. *United States*.

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the Court of Appeals: Georgia Power Company, a member of Southern Company, a holding company of four utilities; Charles King and Willie Moreman, representing themselves and a class of all black Laborers employed at the Atkinson-McDonough Plant of the Georgia Power Company at the time of trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Local Union No. 84, International Brotherhood of Electrical Workers, AFL-CIO, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Georgia Power Co.*, 634 F.2d 929, entered on January 22, 1981.

OPINIONS BELOW

The decision of the district court after trial is reported at 3 FEP Cases 767 (N.D. Ga. 1971), and is reprinted in the separate Appendix hereto as App. E (70a-128a). The first opinion of the court of appeals is reported at 474 F.2d 906 (5th Cir. 1973), and is reprinted as App. D (32a-69a). The order of the district court modifying the Amended and Final Decree is re-

ported at 470 F.Supp. 649 (N.D. Ga. 1979), and is reprinted as App. C (23a-31a). The order of the district court denying private plaintiffs' motion to reconsider the modification (September 28, 1979) is reprinted as App. B (18a-22a). The opinion of the court of appeals vacating the modification—the decision from which certiorari is sought—is reported at 634 F.2d 929 (5th Cir. 1981), and is reprinted as App. A (1a-17a).

JURISDICTION

The court below entered judgment on January 22, 1981, App. F (129a). On April 2, 1981, Mr. Justice Powell extended the time for filing this petition to and including June 21, 1981, App. G (131a). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent parts of Sections 703(a), (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g) are reprinted in an appendix in the back of this petition.

STATEMENT OF THE CASE

A. Procedure

This case originated as three employment discrimination suits brought under Title VII of the Civil Rights Act of 1964. Two of the suits were class actions by private plaintiffs and one was a pattern and practice suit by the United States. All three were consolidated for trial. In June 1971, the district court made findings of fact and conclusions of law following an extensive trial. *United States* v. *Georgia Power Co.*, App. E. That decision was appealed and the court of appeals remanded for further consideration of the testing practices used

by the Georgia Power Company and of the propriety of awarding back pay and further seniority relief in order to fully remedy the Company's discrimination. App. D. On January 31, 1974, an Amended and Final Decree was entered. 7 EPD ¶ 9167.

The Amended and Final Decree was directed almost exclusively to affirmative and monetary relief from the Company. However, one section of the decree did affect the seniority system by allowing affected class members to assert Company seniority in certain instances rather than the collectively bargained job classification seniority. App. 4a-5a. This modification of the seniority system was based on the theory, enunciated in *Local 189, Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), that an otherwise neutral seniority system violated Title VII if it perpetuated the effects of prior discrimination.

Following this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977), petitioner Local 84, International Brotherhood of Electrical Workers, moved that the 1974 decree be modified to allow full application of the collectively bargained seniority system. The union argued that further application of the decree's seniority provisions would be inequitable because they were based on a theory of Title VII liability rejected in *Teamsters*. The district court agreed with Local 84's assessment and ruled that part of the decree's seniority provisions would no longer be given prospective effect. App. 24a-27a. The court allowed certain affected class members to continue to assert Company seniority as a remedy for discrimination suffered at the hands of the Company. App. 27a-28a.

The private plaintiffs appealed the district court's modification of the decree. The court of appeals agreed with the district court that *Teamsters* represented a sufficient change in the law to warrant modification of the injunctive decree, relying in part on the en banc decision

of the Fourth Circuit in *Patterson* v. *American Tobacco Co.*, 634 F.2d 744 (1980). App. 6a-9a. The court of appeals did not agree, however, that the seniority system at Georgia Power was bona fide. Hence, it held that the district court had abused its discretion in modifying the decree on the basis of *Teamsters*. App. 17a.

The court of appeals tested the district court's determination that the seniority system was bona fide against Fifth Circuit precedent on the question. App. 10a. The court of appeals reviewed the findings made by the district court in 1971 and applied to these findings the four-part test developed by the Fifth Circuit for determining the bona fides of a seniority system. *Swint* v. *Pullman-Standard*, 624 F.2d 525, 530-534 (5th Cir. 1980), *cert. granted*, Nos. 80-1190 and 80-1193, 49 U.S.L.W. 3788 (April 20, 1981). In applying this test, the court of appeals found the following factors to be significant:

> 1. while the seniority system applied equally to all workers, it tended to discourage cross-section transfers and to that extent had a disproportionately adverse effect on black workers who had been assigned to the lowest paid sections;
>
> 2. the seniority units were not based on separate bargaining units;
>
> 3. the seniority system originated during a period of overt discrimination by the Company; and
>
> 4. the seniority system was based on job classifications and sections, and the Company had once had a policy of restricting black workers to the lowest paid of these sections. App. 12a-15a.

Because it had found that all four of these factors indicated the seniority system was not bona fide, the court of appeals vacated the district court's order modifying the decree. App. 11a-12a.

B. Facts

The operative facts of this case are set forth in the district court's findings of June 30, 1971. App. E. On appeal, these findings were affirmed, except that the court felt further validation of the Company's testing requirements was necessary. App. D. The district court relied upon the 1971 findings in modifying the decree, App. C, and the court of appeals relied upon them in vacating the modification, App. A.

The lawsuits that comprise this case encompassed every aspect of the hiring and promotion practices at the Georgia Power Company and the application of the collective bargaining agreement between the Company and the seven local unions, now merged into Local 84. App. 70a-71a. Local 84 was a named party in all three of the suits.

Plaintiffs in all three suits attempted to prove intentional discrimination on the part of the union. They alleged that Local 84 had failed to protect the interests of black workers in contract negotiations and that it had bargained for the maintenance of a seniority system that limited the promotion possibilities of black workers. Prior to trial, a preliminary injunction issued modifying the seniority system with respect to black workers hired before July 1963. App. 71a-72a. This modification was ordered because the system tended to perpetuate pre-1963 discrimination. Further preliminary relief on that basis was denied. Thus, plaintiffs had a compelling reason to show intentional discrimination on the part of the union, since relief on the basis of discriminatory impact had been limited much more narrowly than plaintiffs wished.

Despite plaintiffs' attempts to show that Local 84 had intentionally discriminated against them, the district court found "no showing of any conscious intent." App.

115a-116a. The court noted that the union had long been integrated and that it had vigilantly represented the interests of black workers. App. 104a. It also found that the lines of progression provided in the seniority system contained functionally related jobs and that the system itself "applied equally to whites and blacks." App. 76a and 107a.

Although no intentional union discrimination was shown, the seniority system was modified "under the retrospective rationale of Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969)." App. 71a, and 67a, 106a, and 116a. The seniority system was found unlawful insofar as it perpetuated the Company's discriminatory policies by locking black workers hired prior to July 1963 into positions behind contemporaneously hired white workers. App. 105a-106a.

Prior to July 29, 1963, the Company had an open policy of assigning blacks to the lowest paid jobs of Janitor, Porter, Maid and Laborer. Black workers were not allowed to transfer out of these jobs until the Company discontinued its segregationist policy. App. 34a-35a. Shortly after it began allowing black workers to transfer, the Company imposed the requirements that anyone seeking transfer from one of the traditionally black jobs had to possess a high school education and pass an aptitude test. App. 79a-80a.

For promotion, seniority at Georgia Power is determined by the length of time an employee has served in his job classification and in his department. The contract's term for department is "section." Each section consists of job classifications arranged in lines of progression. Vacancies are filled by the senior employee in the same job classification as the vacancy. If no such employee seeks the job, it is filled by the senior employee in the next lower classification in the section. The

amount of time an employee has served in his section, i.e., section seniority, is important in layoffs and recall from layoff. If an employee transfers between sections, he loses his seniority and starts from the beginning in his new section. App. 76a-77a.

The jobs of Janitor, Porter, and Maid are each in separate sections. Until 1969, the job of Laborer was in a separate section, but in that year the Laborers were merged into other sections. The Laborer's position became the entry level job in various lines of progression. Those who had been Laborers prior to 1969 were allowed to bring their seniority with them to their new sections. App. 77a-78a.

The district court found that the seniority system tended to perpetuate the effects of the Company's discrimination because the Company had made discriminatory assignments by section. Blacks were assigned to the lowest paid sections and kept there until 1963 as a result of overt discrimination. Thereafter, the seniority system made transfers costly because an employee lost his section seniority upon transfer. In the 1971 order, black employees hired prior to July 19, 1963, were allowed to use Company rather than section seniority "to avoid the discriminatory effect of the Company practice." App. 106a.

On appeal, the Fifth Circuit affirmed the findings of the district court, except that it found the validation of the Company's aptitude tests to be inadequate. App. 48a. The court of appeals agreed with the district court's assessment of the seniority system, but suggested that broader relief might be necessary under the rightful place theory, especially if further Company violations were found. App. 66a-68a. On remand, the district court redefined the affected classes entitled to seniority relief to include all black workers affected by the Com-

pany's unlawful hiring, testing, and educational policies. 7 EPD ¶ 9167.

Following the *Teamsters* decision, the district court restricted the affected classes to those employees entitled to relief under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). The decision of the court of appeals vacating this modification is under consideration here.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *TEAMSTERS* v. *UNITED STATES*

Section 703(h) of Title VII provides,

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . .
> 42 U.S.C. § 2000e-2(h).

In *Teamsters* v. *United States*, this Court held that Section 703(h) protects bona fide seniority systems even if they perpetuate the effects of prior intentional discrimination by the employer. 431 U.S. 324, 349-54 (1977). In so holding, the Court rejected the Government's contention that a seniority system which perpetuated prior discrimination could not be bona fide, stating that, "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54.

The purpose of Section 703(h) is to protect every seniority system, regardless of its effects, so long as it is not a ruse intended to perpetuate employment discrimination. Thus, this Court has stated, "[A]bsent a discriminatory purpose, the operation of a seniority system

cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). The reason for this focus on "discriminatory purpose" is obvious. If a seniority system has a disparate impact on blacks and is maintained by the parties for that purpose, it is a ruse to discriminate in a facially neutral manner. Congress did not mean to allow employers and unions to carry out intentionally discriminatory policies through facially neutral practices; consequently, it exempted such practices from Section 703(h)'s coverage by specifying that only bona fide seniority systems are protected and that intentional discrimination remains unlawful even when shrouded in the provisions of a collective bargaining agreement. However, it did mean to protect "neutral, legitimate" seniority systems regardless of their impact. *Teamsters* v. *United States*, 431 U.S. 324, 353-54 (1977).

At trial, the district court considered the purpose and effect of the seniority system at Georgia Power. With respect to those black employees hired before July 29, 1963, remedial seniority credit was necessary "to avoid the discriminatory effect of the company practice." App. 106a. With respect to employees hired after July 29, 1963, the court found that the seniority system was not discriminatory and applied equally to blacks and whites alike. App. 107a. The court of appeals did not disagree with these findings, but suggested that broader seniority relief might be warranted if broader Company discrimination were found by the district court on remand. App. 67a.

The district court noted that the primary reason for the union's presence in the case was as a necessary party under the collective bargaining agreement and that the evidence showed that was the only reason for its presence. App. 128a. The court stated that "no showing of

any conscious intent has been made" with respect to the seniority system's discriminatory impact. App. 115a. It made other findings that indicated the seniority system was neutral and legitimate. The union itself was integrated and represented black workers fully. App. 104a. The lines of progression were rational. App. 76a. The seniority system applied equally to whites and blacks. App. 107a.

In its recent decision, the court of appeals dismisses the significance of the district court's finding that the seniority system involved no "conscious intent" to discriminate. App. 15a. It implies that the district court's statement concerning "Complaints of general discriminatory patterns and practices by the Unions" does not apply to the seniority system. However, this is the rubric under which the district court addressed whether the union discriminated through the operation of its seniority system. App. 73a.

The district court found that the union was a proper party to the suits and the relief under the rationale of *Local 189, Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), because its seniority system tended to perpetuate the Company's prior discrimination and because its contract permitted the Company's discriminatory educational requirements. App. 116a. After this conclusion, the court stated, "Otherwise, there is no evidence of any discrimination by the defendant unions and further relief is denied." App. 116a. The court of appeals reads this statement as applying to the allegations that the union discriminated in handling grievances. App. 16a. That reading is too restrictive. While the statement may be inclusive of the grievance allegations, the "further relief" referred to is the seniority relief sought by plaintiffs for those black workers hired after 1963. App. 106a-108a. Implicit in the district court's denial of this further relief in its 1971 order is the finding that the

seniority system had no discriminatory purpose. If it had such a purpose, the district court would have been compelled to grant the further relief sought by plaintiffs.

The question of discriminatory purpose was litigated at trial. In its most recent order, the district court noted, "the character of the collectively bargained for seniority system was put in issue at the consolidated trial of this action." App. 21a. This observation is correct.

Plaintiffs in all three of the cases consolidated for trial attempted to prove intentional discrimination on the part of the union. In *King* v. *Georgia Power Co.*, the plaintiffs claimed that Local 84 contracted for the maintenance of a seniority system that limited the promotion possibilities of black workers and failed to fairly represent black employees. 295 F.Supp. 943 (N.D. Ga. 1968). In *Moreman* v. *Georgia Power Co.*, the plaintiffs claimed that Local 84 had failed to protect their interests in contract negotiations. 310 F.Supp. 327 (N.D. Ga. 1969). Both the private plaintiffs and the government took extensive discovery regarding the seniority system and collective bargaining at Georgia Power. *E.g.*, *King* v. *Georgia Power Co.*, 50 F.R.D. 134 (N.D. Ga. 1970); *United States* v. *Georgia Power Co.*, 301 F. Supp. 538 (N.D. Ga. 1969).

After the district court's ruling on preliminary relief, plaintiffs had even greater incentive to prove purposeful discrimination in the seniority system, because the court indicated that it was unwilling to extend seniority relief further on the perpetuation of past effects theory. App. 71a-72a. Plaintiffs failed to show any discrimination on the union's part other than that its seniority system perpetuated the effects of Company discrimination, and the district court refused to grant seniority relief beyond what it felt was warranted by that theory. App. 116a.

Absent purposeful discrimination, a seniority system is protected by Section 703(h) regardless of its effects. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). That issue has been fully litigated in this case and it was decided that there was no purposeful discrimination. Despite the court's finding that there was no discriminatory purpose to the seniority system at Georgia Power, the court of appeals concluded that it was not bona fide and not entitled to the protection of Section 703(h). There could be no clearer indication that the Fifth Circuit intends to disregard the substance of this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977).

II. THE FIFTH CIRCUIT'S FOUR PART TEST FOR DETERMINING THE BONA FIDES OF A SENIORITY SYSTEM RENDERS MEANINGLESS THIS COURT'S DECISION IN *TEAMSTERS* v. *UNITED STATES*

In *Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court clearly held that before a seniority system can be deprived of protection under Section 703(h) it must be shown to have a discriminatory purpose. *Teamsters* rejected the theory, advanced in *Local 189, Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), that a seniority system which perpetuates the effects of prior discrimination is not protected by Section 703(h) regardless of its purpose. In a line now extending through four cases, the Fifth Circuit has developed a four part test for determining whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system.[1] As the Fifth Circuit's application of that test has developed, it has become clear that the test's purpose is to resurrect

[1] The fourth case is *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981). *Terrell* relies heavily upon both *Swint* and *Georgia Power*. 644 F.2d at 1115, 1118, and 1119.

the theory of *Local 189* clothed in the language of the *Teamsters* decision.

The four part test for purposeful discrimination was first enunciated in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). There it was described as merely four factors deemed significant in this Court's concrete analysis of the seniority system under consideration in *Teamsters*. 559 F.2d at 352. In *James*, the court was not actually examining a seniority system to determine its bona fides, but rather was explaining its view of *Teamsters* in order to aid the district court in applying that decision. 559 F.2d at 353.

Since *James*, the Fifth Circuit has actually examined several seniority systems with respect to the four factors noted in that decision; in so doing it has developed a rigid four part test. In *Swint* v. *Pullman-Standard*, 624 F.2d 525 (1980), *cert. granted*, Nos. 80-1190 and 80-1193, 49 U.S.L.W. 3788 (April 20, 1981), the Fifth Circuit firmly established that no flexibility would be allowed in the application of this test. With its decision in *Georgia Power*, App. A, the Fifth Circuit has made clear that the effect and intent of its four part test is to "make an 'endrun' around the decision in *Teamsters*." *Carroll* v. *Steelworkers*, 23 FEP Cases 238, 248, n.8 (D. Md. 1980), (describing a remarkably similar evasion by EEOC).

In this case, the court of appeals refused to directly address the question of discriminatory purpose, dismissing the district court's earlier finding on that issue, with the comment, "A failure to show conscious intent to discriminate does not preclude a finding of discriminatory purpose." App. 15a.[2] Instead, the court of appeals

[2] This statement appears to be in conflict with the definition of discriminatory purpose given by this Court in *Personnel Admin-*

found discriminatory purpose on the basis of its four part test. The application of that test in this case shows that it merely redefines discriminatory purpose so that the standards enunciated in *Local 189* for determining a seniority system's bona fides are still viable. In short, the Fifth Circuit finds disparate impact sufficient to prove discriminatory intent.

The first factor noted by the court of appeals in determining that the Georgia Power seniority system was not bona fide is that it has a disparate impact on black workers hired during the period of Company discrimination. App. 12a. The system has this impact because it is essentially departmental in nature and the Company at one time assigned black workers exclusively to the lowest paid departments.[3] There is no doubt that the Company engaged in purposeful discrimination. However, the fact that this discrimination continued to have

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istrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979). In *Feeney* the Court stated, " 'Discriminatory purpose', however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group." 442 U.S. at 279 (footnotes and citations omitted). Although *Feeney* was not a Title VII case, its definition of discriminatory purpose has been applied in determining the bona fides of a seniority system for Section 703(h) purposes. *Carroll* v. *Steelworkers*, 23 FEP Cases 238, 248 (D. Md. 1980), *aff'd per curiam*, No. 80-1412 (4th Cir. December 30, 1980).

[3] The court exaggerates the disparate impact by failing to note that many white workers were also placed in departments that were less than the most desirable. For example, meter readers in Section XV had no chance for advancement without transferring to another section and thereby losing their seniority. Their maximum wage rate under the 1968 agreement was $668.00 per month, while employees in Section XI could advance through eight job classifications to a maximum of $984.00. Gov't Exhibit 2, 75 and 77.

some effect because of the structure of the seniority system does not establish that the seniority system had a discriminatory purpose.

The second factor considered by the court of appeals is that the seniority units are not each in separate bargaining units. App. 13a. Because they are not in separate bargaining units, the court of appeals did not consider the district court's findings that the seniority units are made up of "functionally related jobs," App. 76a, and that the system itself "is not untypical of those negotiated through collective bargaining," App. 27a. It is completely irrational to attach any significance to the fact that the seniority system at Georgia Power encompasses only one bargaining unit.[4] Moreover, it is contrary to this Court's direction in *Teamsters* that departmental and job seniority systems are just as entitled to protection under Section 703(h) as company-wide seniority systems. *Teamsters* v. *United States*, 431 U.S. 324, 355 n.41 (1977).

The third factor considered by the court of appeals is that the seniority system had its genesis in a period of overt racial discrimination by the Company. App. 13a-14a. This factor cuts both ways, however. The fact that the Company had an open policy of allowing blacks to work only in certain departments meant that the seniority system was irrelevant to the segregationist employment patterns. Regardless of seniority, the Company would not allow blacks to work in any other than four sections. In fact, against this background the nondis-

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[4] The district courts in the Fifth Circuit have expressed difficulty in determining the meaning of this second factor. *E.g.*, *Swint* v. *Pullman-Standard*, 17 FEP Cases 730, 734 (N.D. Ala. 1978); *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1103, 1132 (N.D. Fla. 1979). Thus far, they have apparently guessed wrong, and it is doubtful that the direction given in *Georgia Power* will alleviate the problem.

criminatory nature of the fully integrated union stands out in bold relief. Judge Pointer found similar facts to be significant in determining that the Steelworkers' seniority system did not have a discriminatory purpose. *Swint* v. *Pullman-Standard*, 17 FEP Cases 730, 737-38 (N.D. Ala. 1978); *accord*, *Carroll* v. *Steelworkers*, 23 FEP Cases 238, 245-46 (D. Md. 1980), *aff'd per curiam*, No. 80-1412 (4th Cir. December 30, 1980). Local 84 submits that Judge Pointer's method of analysis is much closer to the spirit of the *Teamsters* decision than the method followed by the Fifth Circuit in *Swint* and *Georgia Power*.

Finally, the court of appeals concluded that the seniority system was not negotiated and maintained free from any discriminatory purpose because it "tracked and reinforced the purposefully segregated job classification scheme maintained by the company." App. 14a. The court reached this conclusion because blacks were at one time assigned to the sections with the lowest paid jobs and the seniority system was such that transfer from these sections, when the Company finally allowed such transfers, resulted in a loss of section seniority.[5] To say

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[5] Three of the four black job classifications were essentially maintenance jobs—Janitor, Porter, and Maid. These jobs are functionally unrelated to any other jobs and remained in separate sections following entry of the Amended and Final Decree. The other predominantly black job classification was Laborer. In 1969, Laborers were merged into other sections according to the functional relationship between the Laborer's job and the jobs in each section. The court of appeals suggests that this change was made to benefit white workers hired as Laborers. App. 14a. However, the changes were of much greater benefit to black workers as they continued to make up the bulk of employees in that classification and tended to have more seniority in that section than white workers. App. 82a-85a. Merging these workers into previously all white sections was detrimental to a number of white workers because they suddenly had to compete with more senior black workers who had not previously been in their seniority unit. A

that the seniority system "tracked and reinforced" the Company's discrimination is to say nothing more than that it tended to perpetuate the effects of that discrimination. Whenever a seniority system perpetuates prior discrimination there must be some relationship between the system and the form of discrimination, otherwise the system could not perpetuate the effects of the discrimination. By the court of appeals' reasoning, if a departmental seniority system has a disparate impact on a particular racial group because the employer has assigned members of that group to the least desirable departments, the departmental seniority system is per se unlawful. That reasoning is contrary to *Teamsters*.

Taken by themselves or in aggregate, the four factors considered by the court of appeals show nothing more than that the seniority system had an adverse impact on certain black workers because the Company had a policy of assigning blacks to the least desirable sections and not allowing them to transfer out. Yet based on this disparate impact alone, the court of appeals found discriminatory purpose and denied the protection of Section 703(h) to the seniority system.

The effects of this method of analysis will not be confined to the seniority system at Georgia Power. The *Georgia Power* decision has already become ensconced, along with *Swint*, in the line of Fifth Circuit precedent on the question of discriminatory purpose. Thus, in a recent decision the Fifth Circuit has stated,

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more logical explanation for that change is that faced with these lawsuits, the Company and the union tried to minimize any adverse impact that the seniority system had on blacks in order to limit liability under *Local 189*. The Laborers could be merged into other sections because their jobs were functionally related to the jobs in those sections. The Janitors, Porters and Maids could not be merged into other sections because their jobs were unrelated to any other jobs.

> We have since [*James*] held that disparate impact constitutes not only relevant evidence of discriminatory purpose, *Swint*, but can conclusively resolve the "equality" factor in favor of those who have suffered such discrimination. *See Georgia Power.*
> *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112, 1119 (1981).

Even in the more concrete form described in *James* v. *Stockham Valves*, this four part test has created confusion among the district courts of the Fifth Circuit. It now threatens to give these courts serious misdirection in applying Section 703(h). Prior to the recent trilogy of *Swint*, *Georgia Power*, and *Terrell*, Judge Stafford of the Northern District of Florida expressed misgivings about the Fifth Circuit's direction:

> It does not appear from Teamsters itself that the Supreme Court intended to fashion a rigid test from these four criteria. Rather, these were matters used to bolster the Court's conclusion in that case. Swint v. Pullman-Standard, 17 FEP Cases 730, 734 (N.D. Ala. 1978). Considerable difficulty is entailed by attempting to apply the four factors to every case, no matter how dissimilar to the factual circumstances in Teamsters. This court is obliged to follow the lead of the Fifth Circuit, however.
> *Winfield* v. *St. Joe Paper Co.*, 20 FEP Cases 1103, 1131 (N.D. Fla. 1979).

Judge Pointer of the Northern District of Alabama has made two praiseworthy attempts to salvage the spirit of the *Teamsters* decision while following the Fifth Circuit's four point formula, both times he has been reversed. *Swint* v. *Pullman-Standard*, 17 FEP Cases 730 (N.D. Ala. 1978), *rev'd* 624 F.2d 525 (5th Cir. 1980), *cert. granted*, Nos. 80-1190 and 80-1193, 49 U.S.L.W. 3788 (April 20, 1981); *Terrell* v. *United States Pipe and*

Foundry Co., 22 FEP Cases 1695 (N.D. Ala. 1979), *rev'd* 644 F.2d 1112 (5th Cir. 1981).[6]

In this case, Judge Murphy simply relied on previous findings that there was no intent to discriminate in the seniority system at Georgia Power. That issue had been litigated earlier in trial, and it was decided that the seniority system was free of any discriminatory purpose. The court of appeals ignored the findings on this question and applied its four part analysis to find discriminatory purpose based on the effects of the system. Of the four Fifth Circuit decisions developing this analysis, *Georgia Power* gives the clearest indication that the Fifth Circuit intends to apply its four part test to find discriminatory purpose and liability under *Teamsters* in every instance where it would have previously found discriminatory impact and liability under *Local 189*.

The Fifth Circuit's test for determining the bona fides of a seniority system is similar in form and substance to the "Zimmer criteria" applied by the Fifth Circuit in equal protection cases. *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (1973), *aff'd on other grounds sub nom.*, *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). The Fifth Circuit continued to apply this test which focused on discriminatory effect even after this Court held that it is necessary to show discriminatory purpose to prove a violation of the Equal Protection Clause. *Mobile* v. *Bolden*, 466 U.S. 55, 71 (1980). Just as it was necessary for this Court to explain that an abstract test focusing on effect was insufficient to estab-

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[6] Judge Pointer's decision in *Swint* was followed in *Carroll* v. *Steelworkers*, 23 FEP Cases 238 (D. Md. 1980). Judge Miller's opinion in *Carroll* is another example of how district courts should apply *Teamsters*. His decision was affirmed by the Fourth Circuit in a *per curiam* decision "for the reasons assigned by the district court." No. 80-1412 (December 30, 1980). Judge Miller would almost certainly have been reversed by the Fifth Circuit applying its *Swint* test.

lish discriminatory purpose in equal protection cases, it is now necessary that the Court explain that a similar test will not establish discriminatory purpose in Title VII cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTE INVOLVED

Section 703(a), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(c) provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of em-

ployment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) provides as follows:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . .

Section 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) provides as follows:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsi-

ble for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the persons or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.